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1 Jeremy J. Alberts, State Bar No. 273290
 2 jeremy@mytrustedattorney.com
 3 Batkhand Zoljargal, State Bar No. 262918
 4 zola@mytrustedattorney.com
 5 LAW OFFICE OF JEREMY J. ALBERTS
 6 125 W. Amerige Avenue
 7 Fullerton, CA 92832
 8 Telephone: (714) 441-1144
 9 Facsimile: (714) 441-1546

BY: _____
 2013 JUN 25 PM 3:54
 CLERK U.S. DISTRICT COURT
 CENTRAL DIST. OF CALIF.
 RIVERSIDE

FILED

10 Attorneys for Plaintiff,
 11 ROBERT BURNS and KRISTEN BURNS

12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA – RIVERSIDE**

14 ROBERT BURNS, an individual;
 15 KRISTEN BURNS, an individual,
 16
 17 Plaintiffs,

18 v.

19 HSBC Bank USA, National
 20 Association as Trustee for ACE
 21 Securities Corp. Home Equity Loan
 22 Trust, Series 2004-FM2 Asset Backed
 23 Pass-Through Certificates, a National
 24 Association; OCWEN LOAN
 25 SERVICING, LLC, a Delaware
 26 Limited Liability Company; and
 27 DOES 1-10, inclusive,

28 Defendants.

CASE NO.: EDCV 12-01748-JGB(OPx)

Hon. Jesus G. Bernal

VERIFIED COMPLAINT FOR:

1. NEGLIGENCE
2. WRONGFUL FORECLOSURE
3. VIOLATION OF 15 U.S.C. 1641(g)

DEMAND FOR JURY TRIAL

COME NOW Plaintiffs, ROBERT BURNS and KRISTEN BURNS
 (hereinafter collectively referred to as "Plaintiff") and herein complain and allege as

BY FAX**COPY**

1 follows:

2 **PRELIMINARY STATEMENT**

3 1. Plaintiff instituted this action for actual and compensatory damages,
4 statutory damages, rescission, restitution, punitive damages, attorney fees, and costs
5 of this action against Defendants for violations of the following federal statutes and
6 state law claims:

7 a. Negligence

8 b. Wrongful Foreclosure and Set Aside Trustee's Sale

9 c. Violation of 15 U.S.C. 1641(g)

10 2. Plaintiff only recently discovered the violations of these laws. As
11 Plaintiff is not familiar with, or have any expertise in, mortgage transactions,
12 Plaintiff did not and could not have reasonably discovered these violations despite
13 due diligence. As such, this action is timely as any and all applicable statutes of
14 limitations were equitably tolled pursuant to state and/or federal law.

15 **JURISDICTION AND VENUE**

16 3. Jurisdiction of this court is invoked under a federal question pursuant to
17 the federal statutes outlined above and 28 U.S.C. §§ 1331, 1343, 2201, 2202, 15
18 U.S.C. § 1692, 42 U.S.C. § 1983.

19 4. This Court has supplemental jurisdiction over Plaintiffs' state law
20 claims pursuant to 28 U.S.C. § 1367.

21 5. This Court has original jurisdiction over the claims in this action based
22 on 28 U.S.C. § 1332 which confers original jurisdiction on federal district courts in
23 suits between diverse citizens that involve an amount in controversy in excess of
24 \$75,000.

25 6. This Court has jurisdiction to render the declaratory judgment Plaintiffs
26 seek pursuant to 28 U.S.C. § 2201.

27 7. Venue is proper within this district pursuant to 28 U.S.C. § 1391(b),
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1 because: (i) the real property exists within said district, and/or (ii) the Defendants,
2 and each of them, have done or are doing business within the district.

3 **PARTIES**

4 8. Plaintiffs ROBERT BURNS and KRISTEN BURNS (hereinafter
5 collectively "Burns") is an adult resident citizen of San Bernardino County,
6 California over the age of eighteen years, and own real property at 970 S Encina
7 Ave., Rialto, California, 92376 (hereinafter referred to as "Subject Property" or
8 "Property"). Burns obtained a mortgage loan from Fremont Investment and Loan
9 ("Fremont"). Fremont purportedly securitized the loan and claimed to transfer this
10 Plaintiff's Note and Deed of Trust to the ACE Securities Corp, Series 2004-FM2
11 ("Trust"). HSBC Bank USA, National Association as Trustee for ACE Securities
12 Corp. Home Equity Loan Trust, Series 2004-FM2 Asset Backed Pass-Through
13 Certificates acted as Trustee to that Trust and retained OCWEN LOAN
14 SERVICING, LLC to service these Trust loans. Defendants retained First American
15 Trustee Servicing Solutions, LLC (hereinafter referred to as "Foreclosing Trustee")
16 to foreclose Plaintiff's Property.

17 9. Defendant, HSBC Bank USA, National Association as Trustee for
18 ACE Securities Corp. Home Equity Loan Trust, Series 2004-FM2 Asset Backed
19 Pass-Through Certificates (hereinafter referred to as "Trustee") is a National
20 Association doing business in San Bernardino County, California and, on
21 information and belief, is the Trustee for a pool of securitized mortgages more
22 particularly referenced to as the ACE Securities Corp, Series 2004-FM2 (hereinafter
23 referred to as the "Trust") which are special purpose vehicles or "SPV" in industry
24 parlance, which purchases mortgages and then sells securities backed by the income
25 from the mortgages purchased.

26 10. Defendant OCWEN LOAN SERVICING, LLC (hereinafter referred to
27 as "Servicer") is a Delaware Limited Liability Company doing business in San
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1 Bernardino County, California and, on information and belief, is and was at all times
2 material hereto engaged in the business of servicing mortgage loans and were acting
3 as the servicers in the transactions underpinning this cause.

4 11. Plaintiffs are not aware of the true names and capacities of the
5 Defendants sued herein as DOES 1 through 10, inclusive, and therefore sue these
6 Defendants by such fictitious names. Each of said fictitiously named defendants is
7 responsible in some manner for the violations of law herein alleged. Plaintiffs will
8 amend this complaint to add the true names of the fictitiously named Defendants
9 once they are discovered. Whenever reference is made in this complaint to
10 "Defendants," such reference shall include Does 1 through 10.

11 12. When reference in this complaint is made to any act or transaction of a
12 defendant corporation, company, association, business entity, or partnership, such
13 allegation shall be deemed to mean that said defendant and its owners, officers,
14 directors, agents, employees, or representatives did or authorized such acts while
15 engaged in the management, direction, or control of the affairs of Defendants and
16 while acting within the scope and course of their duties.

17 13. Whenever in this complaint reference is made to any act of any
18 individual defendant, such allegation shall be deemed to mean that said defendant is
19 and was acting (a) as a principal, (b) under express or implied agency, and/or (c)
20 with actual or ostensible authority to perform the acts so alleged on behalf of every
21 other defendant herein.

22 14. Whenever in this complaint reference is made to any act of Defendants,
23 such allegation shall be deemed to mean the act of each defendant acting
24 individually and jointly with the other Defendants named in that cause of action.
25 The defendants are engaged in a joint venture as defined by California law and as
26 such are liable joint and severally for the actions of all members of the joint venture.
27
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COMMON FACTUAL ALLEGATIONS

17. On or around March 3, 2004, Plaintiff herein executed a Note (hereinafter referred to as “Note”) and Deed of Trust (hereinafter referred to as “Deed of Trust”) in favor of the Fremont and Mortgage Electronic Registration Systems (“MERS”) as a nominal beneficiary thus obtaining mortgage loans on their respective homes.

18. The loan offered to Plaintiff was particularly unsuitable for their needs. However, Fremont knew they would have no liability for Plaintiff’s default because at the time of the loan’s origination, Fremont securitized and sold their Note to investors by virtue of creating a securitized trust. In effect, the long term liability and risk of default was passed onto investors simultaneously with the origination of the loan.

19. Plaintiff alleges that Trustee is engaged in and has engaged in a pattern and practice of falsifying loan transactions and in particular assignments of mortgages for the purpose of enabling its joint venturers to foreclose on property of unsuspecting or unknowing consumers illegally and without legal standing to foreclose.

20. In the instant case, the Note and Deed of Trust were not assigned to the Trust until December 23, 2009, well past the **Error! Reference source not found.** Closing Date. Another Assignment was executed and recorded on or about January 19, 2012. Defendant’s never notified Plaintiff of either transfer according to 15 U.S.C. 1641(g).

21. Furthermore, MERS only had authority of a nominee. At the time MERS executed the first assignment, Fremont was closed and under Federal Bankruptcy protection. Plaintiff is informed and believes and based thereon alleges that Fremont never instructed or authorized MERS to make the assignment and if MERS did, Plaintiff does not believe the transfer was disclosed to the bankruptcy

1 court or trustee.

2 22. Plaintiff is informed and believes and based thereon alleges that after
3 Defendants realized their defects in the chain of title resulting from the improper
4 securitization, they implemented a scheme to falsify and backdate documents.

5 23. Plaintiff further alleges, on information and belief, that Defendants
6 employed and utilized individuals who simply sign thousands of property record
7 documents without any legal or corporate authority and without so much as
8 reviewing the documents they are signing. For instance, Plaintiff believes that
9 employees of Trustee, Servicer, and Foreclosing Trustee, falsely claimed to be
10 agents of Fremont so that they could assign the Note years after the Trust's closing
11 date and after Fremont went out of business. Such persons have come to be known
12 as a "robo-signors."

13 24. California Commercial Code Section 3301 limits a negotiable
14 instrument's enforcement to the following:

15 "Person entitled to enforce" an Instrument means (a) the holder
16 of the instrument, (b) a nonholder in possession of the
17 instrument who has the rights of a holder, or (c) a person not in
18 possession of the instrument who is entitled to enforce the
19 instrument pursuant to Section 3309 or Subdivision (d) of
20 Section 3418.

21 25. Furthermore, on information and belief, Plaintiff alleges that none of
22 Defendants were present holders in due course of Plaintiff's Note such that they can
23 enforce Plaintiff's obligation and demand mortgage payments.

24 26. On information and belief, none of Defendants are non-holders in
25 possession of Plaintiff's Note who have rights of the holder.

26 27. Plaintiff further alleges, on information and belief, that the Trust that
27 claims to own Plaintiff's Note and Deed of Trust has been dismantled due to the
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1 disbursement and receipt of mortgage insurance payouts to Trustee and Certificate
2 holders (including, but not limited to, credit default swaps and other mortgage
3 insurance products). As a result of these mortgage insurance payouts, Trustee has
4 already been paid in full on Plaintiff's debt obligation.

5 28. Plaintiff allege that Trustee and Servicer, having already benefited from
6 an American taxpayer bailout, seeks another bailout by submitting a blatantly
7 fabricated "Assignment", thereby committing fraud on the Court, and misleading the
8 Plaintiff into believing that Trustee and/or the Trust were Plaintiff's actual creditors
9 and were entitled to foreclose on Plaintiff's home.

10 29. As an additional attempt to correct deficiencies in the chain of title and
11 in order to effectuate a swift non-judicial foreclosure of Plaintiff's home,
12 Defendants substituted the foreclosure trustee agreed upon in Plaintiff's Deed of
13 Trust for their own trustee. Plaintiffs allege, on information and belief, that
14 Foreclosing Trustee was either a wholly owned subsidiary of Trustee and/or
15 Servicer. By utilizing a non-arm's length trustee, Defendants were able to
16 accomplish the foreclosure without any question as to the authenticity of title or the
17 legality of the sale itself.

18 30. Provision 24 of the Deed of Trust governs the Substitution of Trustee.
19 It provides in relevant part:

20 "Lender, at its option, may from time to time appoint a
21 successor trustee to any Trustee appointed hereunder by an
22 instrument executed and acknowledged by Lender... This
23 procedure for substitution of trustee shall govern to the
24 exclusion of all other provisions for substitution."

25 31. In violation of Provision 24, and Cal. Civ. Code Section 2934(a),
26 Fremont failed to file a valid Substitution of Trustee, substituting Foreclosing
27 Trustee as the new trustee. Any recorded Substitution is void because it was not
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1 executed by Fremont, or their agents, but instead by MERS or Defendants herein.
2 These defendants were not the current "Lender" at the time of the execution of the
3 Substitution. Trustee claims to have the power to record the substitution but never
4 had a valid assignment of the Deed of Trust. Therefore, the Foreclosing Trustee
5 substituted in was not allowed to act as the trustee under the Deed of Trust.

6 32. Any substitutions recorded on title by the defendants are fraudulent,
7 and the execution, filing, and recordation of the documents are for the purpose of
8 facilitating and aiding and abetting the illegal, deceptive, and unlawful collection
9 and attempts to collect on Plaintiff's obligation.

10 33. Plaintiff further alleges that Servicer failed to offer pre-foreclosure loss
11 mitigation as required by the Pooling and Servicing Agreement. The PSA requires
12 that Servicer and Trustee take certain actions to prevent foreclosure before
13 acceleration of the loan and foreclosure. This failure requires that the underlying
14 action seeking foreclosure be dismissed or abated until such time as Servicer and
15 Trustee comply with these requirements.

16 34. Plaintiff relied on Servicer's and Trustee's misrepresentations and have
17 been damaged in the following ways: (1) Plaintiff has been paying the wrong party
18 for an undetermined amount of time and overpaid in interest that was
19 overcalculated; (2) Plaintiff has suffered damage to credit; (3) the title of Plaintiff's
20 home has been lost through wrongful foreclosure; (4) Plaintiff is facing an imminent
21 eviction from the subject properties; (5) Plaintiff has expended significant funds to
22 cover the cost of attorneys' fees and related costs; (6) Plaintiff's reputations has
23 diminished in the community; and (7) multiple parties may seek to enforce their
24 debt obligations against Plaintiff.

25 35. Plaintiff contends that all of the wrongful conduct on the part of
26 Defendants complained of herein is either intentional, negligent, or wanton
27 depending upon evidence adduced at trial and that the Plaintiff's claims against
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1 Defendants should serve as a set off or be treated as a counterclaim against any
2 sums owed to any defendant (assuming that any defendant had standing to collect
3 payments).

4 36. Plaintiff contends that the foreclosure sale should be enjoined until
5 such time as the Plaintiff's claims are heard and they offset or diminish to some
6 degree any claims that Defendants have on the note.

7 37. Plaintiff claims all damages allowed under law for the injuries that have
8 been sustained.

9 38. As a result of Defendants' actions, Plaintiff has been injured and
10 harmed in that they have suffered financial loss, damage to their reputation, and
11 have also suffered mental anguish worrying about the status of their home and the
12 possibility of becoming homeless.

13 39. Plaintiff alleges that Defendants are equitably estopped from
14 foreclosing because they have unclean hands by virtue of their actions in the
15 origination and servicing of the loans that underlie this case.

16 40. Plaintiff alleges that Foreclosing Trustee does not have standing to
17 initiate a foreclosure action against the Subject Property. Perhaps the Fremont had
18 standing to foreclose but no Fremont in this case ever started foreclosure
19 proceedings or even assisted in the foreclosure process. In fact, Plaintiff believes
20 that Fremont herein went out of business before Defendants started foreclosure
21 proceedings against Plaintiff. As grounds therefore, Plaintiff is willing to provide at
22 an evidentiary hearing, proof of said lack of standing for the other defendants to
23 foreclose.

24 41. In addition to seeking compensatory, consequential, punitive, and other
25 damages, Plaintiff seeks an Order Setting Aside any Notice of Default, and/or
26 Notice of Trustee's Sale, and Declaratory Relief as to whether Trustee has/had any
27 right to foreclose on Plaintiff's Property or collect Plaintiff's mortgage payments.
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1 42. Additionally, Plaintiff's home was wrongfully foreclosed upon after
2 Plaintiff received a valid loan modification from Defendant Ocwen's predecessor,
3 Litton Loan Servicing, LLC (hereinafter "Litton.") Pursuant to a loan modification
4 offer from Litton, Plaintiff and Litton agreed to place a series of fees to be paid at
5 the end of the loan. Upon buying the loan from Litton, and stepping into the shoes
6 of Litton regarding all of their rights and obligations to the loan, Defendant Ocwen
7 immediately asked for the series of fees to be paid up front. Ocwen informed
8 Plaintiff that any payment made would only go toward the fees, and the regular
9 payments would be considered late until the fees were paid.

10 43. Ocwen violated the terms of the loan modification offered by its
11 predecessor in interest, accepted by Plaintiff and consummated by both parties.
12 Ocwen's violation of its predecessor's promise forced Plaintiff into Default. And
13 then Ocwen immediately proceeded to Default and foreclosure, refusing to discuss
14 or negotiate the matter with Plaintiff. Ocwen negligently and recklessly proceeded
15 to foreclosure in violation of a binding and valid loan modification that Plaintiff had
16 negotiated with Ocwen's predecessor, Litton, and made payments thereto.

17 COUNT I

18 NEGLIGENCE

19 (Against All Defendants)

20 85. Plaintiff incorporates by reference all prior paragraphs as if fully set
21 forth herein.

22 86. As the purported current pecuniary beneficiary of Plaintiff's Note and
23 Deed of Trust, Trustee owed a duty of care to Plaintiff to discharge its contractual
24 duties under the Deed of Trust with reasonable care. Trustee breached its duty of
25 care to Plaintiff when they directed the Foreclosing Trustee to declare a default and
26 initiate foreclosure against Plaintiff.

27 87. Servicer is vicariously liable for the illegal, fraudulent, and negligent
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1 conduct of its purported agents, including the Foreclosing Trustee.

2 88. Servicer owed Plaintiff an additional fiduciary duty to properly collect
3 payments, distribute payments, debit the Plaintiff's accounts and credit the
4 Plaintiff's accounts.

5 89. Servicer also owed the Plaintiff a duty not to assess illegal,
6 unauthorized, or improper charges and to service the mortgage of Plaintiff in a
7 commercially reasonable manner so as to not create a false default or a default not
8 based on fact.

9 90. Servicer breached their duty to Plaintiff by not properly crediting the
10 Plaintiff's account or distributing the Plaintiff's payments appropriately and by
11 applying to Plaintiff's account charges which are illegal, unauthorized, or improper
12 and servicing the Plaintiff's loan in a manner that is commercially unreasonable and
13 by creating a false default or exacerbating a default for the purposes of unjustly
14 enriching themselves and other defendants.

15 91. As an actual and proximate cause of the reckless breach of duty of
16 care, utter carelessness, and blatant fraud of Defendants as set forth above, Plaintiff
17 has suffered (and continue to suffer) damages. The defective chain of title has
18 rendered Plaintiff's Property unmarketable and fatally defective, and has further
19 caused Plaintiff to lose saleable title to the Subject Property and as a result, Plaintiff
20 has lost the Property to a wrongful foreclosure.

21 92. As an actual and proximate cause of the breach of duty of care and
22 carelessness of the Defendants as set forth above, Plaintiff suffered, and continues to
23 suffer, general and special damages in an amount to be determined at trial, severe
24 emotional distress, including attorneys' fees and costs of bringing suit to challenge
25 said Defendants' right to enforce their debt obligations against them.

COUNT II
WRONGFUL FORECLOSURE
(Against All Defendants)

93. Plaintiff incorporates by reference all prior paragraphs as if fully set forth herein.

94. Servicer and Trustee exercised the power of sale under the Deed of Trust and are foreclosing on Plaintiff's Property.

95. As set forth above, since Trustee's purported status as beneficiaries is void *ab initio*, Trustee does not have the authority to exercise the power of sale within the Deed, and the Trustee cannot initiate foreclosure based upon defaults known to Trustee. Therefore, any foreclosure is void *ab initio*.

96. Foreclosure was initiated by Trustee and/or the Foreclosing Trustee, without privilege and with malice, as the Defendants knew that a "default" has never occurred. As stated, Trustee was not owed any money, the Foreclosing Trustee was not the trustees identified in the Deed of Trust, and Trustee had no pecuniary interest in the loan, and was not a beneficiary of the Note and Deed of Trust. Therefore, despite the fact that said Defendant knew no "default" has occurred, they proceeded with the foreclosure on Plaintiff's Property.

97. Upon information and belief, Plaintiff alleges that the Note and Deed of Trust as the same described above, were improperly pledged or sold to another party, and such sales were not done in accordance with Article 3 or Article 9 of the California Commercial Code and were therefore improper and failed to confer any legally cognizable rights in any party claiming to be a beneficiary of the Note and the Deed of Trust.

98. No true sales of the Note and Deed of Trust, as required per securitization documents, ever actually took place between any of the intermediaries in the securitization chain. Thus, Plaintiff is open to double or triple financial

1 jeopardy from unknown claimants.

2 99. At no point in time did the purported original beneficiaries of the Deed
3 of Trust assign their interests in the Subject Property to any purported holders in due
4 course of the Note or Deed of Trust.

5 100. In that the Trustee had no interest that was assigned to them, thus, they
6 could not proceed with a foreclosure.

7 101. On information and belief, at the time Defendants the Trustee and/or
8 the Foreclosing Trustee commenced the foreclosure proceedings, they had no legal
9 or equitable interest in the Note and Deed of Trust, and thus no amount was owed
10 from Plaintiff to Trustee.

11 **COUNT III**

12 **VIOLATION OF 15 U.S.C. 1641(g)**

13 **(ALL DEFENDANTS KNOWN OR UNKNOWN AND** 14 **CLAIMING ANY INTEREST IN THE PROPERTY)**

15 **(Against All Defendants)**

16 102. Plaintiff incorporates by reference all prior paragraphs as if fully set
17 forth herein.

18 103. At all relevant times hereto, HSBC Bank USA, National Association as
19 Trustee for ACE Securities Corp. Home Equity Loan Trust, Series 2004-FM2 Asset
20 Backed Pass-Through Certificates is the trustee for a mortgage backed security that
21 was and is the creditor of the subject note and mortgage. The District Court in
22 *Vogan vs. Wells Fargo*, 2011 U.S. Dist. LEXIS 132944, (E.D. Cal. Nov. 16, 2011)
23 found that the Trustee of a MBS was the Creditor under the 15 U.S.C. § 1641(g).
24 The Court's Opinion states in pertinent part: "the Court finds U.S. Bank as trustee
25 for WFMBS 2005-AR12 Trust may be subject to liability arising from a violation of
26 15 U.S.C. § 1641(g) and therefore Defendants' motion to dismiss this claim must be
27 denied."
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1 tendered to and executed by Plaintiff;

2 6. The Court issue an order restraining Defendants, their agents or employees
3 from continuing or initiating any action against the Property and enjoining
4 Defendants, their agents or employees from doing so during the pendency in this
5 matter;

6 7. For an order compelling Defendants to disgorge all amounts wrongfully
7 taken by them from Plaintiff and returning the same to Plaintiff with interest thereon
8 at the statutory rate from the date the funds were first received from Plaintiff;

9 8. For costs of this suit incurred herein;

10 9. For reasonable attorneys' fees incurred;

11 10. Trial by jury; and

12 11. Such other and further relief as this court shall deem fair equitable and
13 just.

14 DATED: June 25, 2013

LAW OFFICE OF JEREMY J. ALBERTS

15
16 By: 

17 Jeremy J. Alberts
18 Batkhand Zoljargal
19 Attorneys for Plaintiffs
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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is 125 West Amerige Avenue, Fullerton, California 92832.

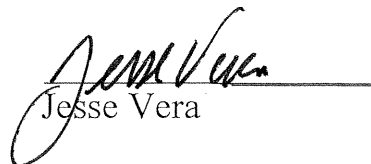
On June 25, 2013, I served the foregoing document, described as Plaintiff's First Amended Complaint on all interested parties in this action as follows:

RACHEL S. OPATIK (SBN 243140)
HOUSER & ALLISON, APC
Carlsbad Pacific Center 1
701 Palomar Airport Road, Suite 200
Carlsbad, California 92011
ropatik@houser-law.com
*Attorneys for Defendants, Ocwen Loan Servicing, LLC and
HSBC Bank USA, National Association, as Trustee for ACE Securities Corp. Home
Equity Loan Trust, Series 2004-FM2 Asset Backed Pass-Through Certificates*

[X] BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

[X] (FEDERAL) I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 25, 2013 at Fullerton, California.


Jesse Vera